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ALEXANDER L. STEVAS,
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SUPREME COURT OF THE UNITED

OCTOBER TERM, 1984

SYDNEY M. EISENBERG, Petitioner

CASE NO. 83-1999

vs.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CLRCUIT

REPLY BRIEF FOR SYDNEY M. EISENBERG
PETITIONER

SYDNEY M. EISENBERG
PETITIONER, PRO SE

1131 West State Street
Milwaukee, Wisconsin 53233
(414)271-0931

QUESTIONS PRESENTED FOR REVIEW: TRIAL JUDGES
MEMORANDUM ORDER DECEMBER 22, 1981

In his memorandum order under date of December 22, 1981 the Trial Judge ordered: "the government is hereby ordered to be prepared to produce the IRS personnel mentioned in the previous order, together with all relevant records for examination by the court and parties" The Court in its decision of December 22, 1981 further stated that the parties should consider the following questions at the Coram Nobis hearing (taken from the Court Order):

"....whether the nature and extent of Auditor Kelly's alleged undisclosed contacts with the Intelligence Division legitimate taxpayer's claim that Agent Kelly, by continuing the 'routine civil audit', obtained evidence by deception in violation of the Fourth and Fifth Amendments. (See United States v. Meir, 607 F.2d 215, 217(8th Cir.1979), cert. denied, 445 U.S. 966(1980); United States v. Stamp, 458 F.2d 759, 774-81(D.C. Cir. 1971) cert. denied, 406 U.S. 975 and 409 U.S. 842 (1972)).

"1) Whether the nature and extent of the alleged undisclosed contacts changed the civil audit into a criminal investigation;

"2) If so, whether and to what extent Agent Kelly continued the investigation after that point in time;



"3) If so, whether Agent Kelly or any other I.R.S. Agent 'affirmatively misled' taxpayer as to the nature of the continuing investigation (see U.S. v. Lehman, 468 F.2d 93, 105 (7th Cir.), cert. denied, 409 U.S. 976 (1972);

"4) If so, whether such deception tainted any of the physical or testimonial evidence adduced at trial;

"5) And if so, whether taxpayer likely would have been acquitted if the court had suppressed that evidence(see U.S. v. Dellinger, ___ F.2d ___ No. 80-2229, slip.op.at 9n.9(7th Cir.August 19, 1981)."

We are also filing an Appendix to include a copy of the Document Production proceeding had in the instant case at the office of the U.S. Attorney, 517 East Wisconsin Ave., Milw.,WI., pursuant to Court Order to prove that the illegal "cover-up" continued with "stonewalling" by him against petitioner.

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LISTING OF ALL PARTIES

All parties to this proceeding are:

S.M. Eisenberg, Petitioner; Hon. Rex E. Lee,
Solicitor General (Washington, D.C.)



ERRORS IN BRIEF IN OPPOSITION

The brief for the United States in opposition to petitioner contains erroneous, crucial statements in direct conflict to the evidence.

The record proved, as stated in the petition for writ of certiorari, Auditor Kelly had for 6 years since July, 1976 had every opportunity to tell the truth about whom he had contacted in the Intelligence Division. Auditor Kelly concealed the truth for 6 years until he realized he would be exposed. His conduct constitutes a travesty upon justice.

Petitioner respectfully requests the court to maintain the same standard of honesty for the IRS auditor as is required of a taxpayer. With respect to page 5 of the Solicitor General's brief the Solicitor General states "Kelly's group manager, while his memory was less than clear, supported Kelly's testimony." This is untrue. Supervisor Maul claimed he never remembered petitioner's case whatsoever, (Tr. 4-1-82; p. 154, lines 1-13) Supervisor Maul said he



had been with the IRS 26 years and throughout that time in Milwaukee; in those 26 years he had discussed a case with IRS Intelligence only once or twice (Tr. 4-1-82, p. 160, lines 20-25). He could not recall any other case outside of petitioner that he had ever conferred with Intelligence.

Part of Agent Levin's notes were destroyed. But January 15, 1971 is the date of the conference confirmed in writing as stated in his diary. (Tr. 6-3-82, p. 169). Another date, September 17, 1970, is confirmed by Auditor Kelly's Ex. 7 proving there were not one but two conferences with Maul, Levin and Kelly. Other records were destroyed by the IRS. Obviously, records favorable to the IRS enjoyed freedom from destruction.

OTHER EVIDENCE WAS OVERLOOKED

The corporation books and records were subject to compulsory process, but, petitioner's books and records were not subject to compulsory process, contrary to IRS's brief. This is significant. He could have stopped it before Kelly had concluded.

Judge Wood overlooked the misrepresentation by Auditor Kelly to gain admission and obtain all available evidence. All of the evidence obtained by Auditor Kelly in the many months after his meeting with Supervisor Maul and Intelligence Agent Levin should have been suppressed at the trial as well as the rest of the evidence. Judge Wood found the petitioner "to his credit never obstructed the investigation." Petitioner would have no reason to do so while he believed a decent, honest, civil audit was being conducted. The evidence which Judge Wood overlooked was all of the evidence accumulated in the photostating and taking of records in the 709 hours of Auditor Kelly's investigation after meeting with Intelligence Agent Levin.



Auditor Kelly admitted that the questions which he was to follow through in his audit were given to him by Supervisor Maul, very shortly after their meeting with Special Agent Simon Levin.(Tr. 6-3-82, p. 152, lines 1-7).

After "Levin," Auditor Kelly spent 88 hours in September, 40 hours in November, 126 hours in December(all in 1970); in 1971, he spent in January, 117 hours, February, 80 hours, April 32 hours, June, 131 hours; total 709 hours--all on petitioner's records, (Government Ex. 24).

Auditor Kelly stated that he made progress during the months after the Simon Levin conversation and prior to the referral of the case "primarily in the areas of the non-business interest expense, the Cates payments, the year end checks...."(Tr.6-3-82, p. 26, lines 2-4).

Auditor Kelly reported conversations between himself and Special Agent Howe, September 19, 1970. Auditor Kelly and Special Agent Howe determined that to what "we" referred to was a



source on application of funds. He went on to discuss the conference in length and said the first firm indication of fraud was with a conference with Mr. Howe, March 25, 1970. He also said Mr. Howe called him in July of 1970 and said he became "less concerned with the \$175,000.00 of unknown sources of funds." (Tr. 6-3-82, pgs. 13-17), so he continued on. (The source was found).

After the case was formally referred on June 30, 1971 to the IRS Intelligence, petitioner was advised of same. Petitioner stated that he ran down to Attorney Paul Lipton's office and Mr. Lipton stated "don't give them anything, stop right here." (Tr. 4-11-82, p. 229, lines 9-18). Attorney Lipton immediately recalled all records and refused any further discussion with the IRS. CPA Levine said his records were immediately taken away from his office by Mr. Lipton and CPA Levine was told not to discuss the matter with anyone (Tr. 6-4-82, p. 146, lines 3-6). The courts overlooked this.



Petitioner stated Auditor Kelly came to read him his rights with Special Agent Schwalbach. Petitioner stated further that Mr. Kelly stated that petitioner was in the same category "that the president of General Motors was responsible for any errors on the part of his employees." (Tr. 4-11-82, p. 228, lines 20-24).

The Court said that it would not approve the conduct of the IRS personnel avoiding their own rules. "If IRS is to scrutinize the most personal affairs of citizens, it should be able to withstand scrutiny itself." The Court continued: "The conduct of IRS, no matter how well intentioned it may have been in the pursuit of possible wrongdoing was to say the least, very disappointing under any version of the evidence," The Honorable Trial Court still overlooked another important point raised, which was: Where substantial violating of the IRS Rules is accompanied with violations of the taxpayer's constitutional rights and due process, the con-



viction should be over turned. It is further significant the Court did not find a deliberate understatement of income on the part of petitioner.

IRS INTELLIGENCE CREATED
AN ATMOSPHERE OF VIOLATIONS

Auditor Kelly had committed perjury at the original trial June 14, 1976 at 9:30a.m. His testimony is repeated on pages 38 and 39 of petitioner's petition for writ of certiorari. Intelligence Agent Charles Howe became Simon Levin's supervisor in March, 1971, and there were discussions from time to time with the agents in one group about various cases (Tr. 6-3-82, p. 192, lines 2-5 and lines 21-25)(asked of Intelligence Agent Levin):

"Q. We have that clear"

"A. Yes, I was transferred out of the group supervisor's slot in March, '71 and then Charles Howe became supervisor. And I was under his supervision...."

The opportunity for collusion existed, prior to the formal referral to IRS Intelligence.

Simon Levin stated it was contrary to the



rules and not "cricket" to have somebody in the Audit Section get information from the Intelligence Section (Tr. 6-3-82, p. 197, lines 19-23, p. 198, lines 1-2).

Levin's instructions January 15, 1971 as to what Kelly should do never considered whether defendant was guilty or not. See the following questions and answers. This is evidence of pure fraud by the IRS (questions of Simon Levin, Assistant U.S. Attorney):

"Q. It is possible his name was not mentioned?

"MR. EISENBERG: That's objected to now.

"THE COURT: He's already said a couple times he thought it was mentioned at the end. I sustain the objection."

He further stated information provided to him. (Tr. 6-3-82, p. 174, lines 5-17):

"Q. What exactly was it that you told Fred Maul and Terry Kelly in response to their statements to you?

"A. The only thing is I asked them if they had all the details of the checks, dates, the dates cancelled, bank records showing what they related to or whatever testimony they needed, statements as to the nature of the checks from the people involved and the same thing regarding



the stock transactions that they had all the documents necessary to refer it and the statements as to what transactions involved. Just to make sure they had enough for referral."

Intelligence Agent Levin recalled the discussion which was held in his office and recalled other discussions with Terry Kelly over the years. (Tr. 6-3-82, p. 166). His diary showed the discussion on January 15, 1971. On that date he stated that it looked like the items involved had fraud potential and he suggested that the case be referred for a joint investigation (Tr. 6-3-82, p. 169, lines 10-15). Auditor Kelly had represented to him that there were possibilities of fraud and gave him the details. He recalled some of the details. He recalled the checks, some interest expense and stock transactions were the two principal fraudulent transactions discussed. Among other things he said: "I do know that this transaction did involve Mr. Eisenberg, yes." (Tr. 6-3-82, p. 173, lines 15 through 25).

When asked "...whether or not the civil audit continued following discussions with Terry Kelly



and Fred Maul?" Levin said he assumed "it continued. Until the referral." (Tr. 6-3-82, p. 175, 8-14).

Levin says that he had a conference with Revenue Agent Kelly and IRS Intelligence Agent Howe November 16, 1972 on the Eisenberg case. These 3 individuals were still on the Eisenberg case.

It is incredible to believe that these people who were all working on the Eisenberg case, working in the same room, talking to each other, regularly, were not discussing how to get the records from petitioner without letting him know of their connection with Auditor Kelly!

April 30, 1971, which is a pre-referral date, Levin was in Charles Howes group. (Tr. 6-3-82, p. 193, lines 1-10).

Agent Levin testified further that the so-called questions submitted to him by Auditor Kelly consisted of 6 pages of various what he called facts. He did not say "alleged," he said "facts." (Tr. 6-3-82, p. 199, lines 1-4). It was Auditor Kelly's opinion that there was fraud and Kelly stated the



.stock transferred in the written memorandum, Ex. 6, was transferred to evade liability (Tr. 6-3-82, p. 203, lines 7-8).

Ex. 7 is a memo from Mr. Maul to Auditor Kelly after the meeting of September 23, 1970, with Agent Levin. There were clearly 2 meetings. One, September 23, 1970 and one, January 16, 1971. (Tr. 6-3-82, p. 203, lines 10-19).

In response to the Courts question, Special Agent Levin conceded that the January 15, 1971 meeting he had with Fred Maul and Agent Kelly could have violated regulations. (Tr. 6-3-82, p. 204, lines 3-9).

When petitioner asked for the diary of 1970 from Mr. Levin, Assistant U.S. Attorney Levin said that "the diaries for 1970 had been destroyed as indicated in the affidavit he had submitted." When petitioner asked why the diary for 1971 was available and the diary for 1970 was not, U.S. Assistant Attorney Levin stated "because we requested the 1971 diary in 1981, when it was still available." But Agent Levin said he turned over

his diaries to the government annually, and had had a diary for 1970. (Tr. 6-3-82, p. 204). The diaries of Howe and Levin were reported as destroyed by the IRS.

AFFIDAVIT OF
TERRENCE P. KELLY

On January 16, 1981, in his affidavit Terrence P. Kelly admitted his discussion with a special agent of the Criminal Investigation Division. He did not name anyone so the first time the name of "Sam" Levin did appear was February 18, 1982. U.S. Assistant Attorney Joel Levin acted improperly with respect to records produced 2/18/82. For example, he only produced a one page excerpt from the diary of one "Sam Levin." On examination of the page in the diary dated January 15, 1971 shows the signature of "Sam Levin" who was apparently Agent Simon Levin.

ACTUAL TESTIMONY IS THE BEST EVIDENCE

Auditor Kelly was in absolute violation of common sense rules. Without his testimony however, all evidence should be stricken. The



petitioner's brief for certiorari definitely shows that the actual testimony completely contradicts the Solicitor General's brief. All of the evidence claimed by the IRS prosecution in every instance simply referred to mistakes made by bookkeepers without petitioner's knowledge.

WHY DID KELLY COME FORWARD?

Why was Auditor Kelly silent as a graveyard on a cold winter's night and took 6 years for him to come forward and admit his withholding the truth, changing his answers when he was previously asked whether he had contact with the Intelligence Division? It is clear that the only reason Kelly finally came forward is because he knew he would have to testify at the new hearing. He knew that the petitioner had new evidence, but, he did not know exactly what it was. Obviously, Kelly knew that proof of his perjury would surface and would be a serious matter.

Violation after violation took place of the administrative guidelines of the IRS as well as



the constitutional rights of petitioner, all combining to create a collusion designed to deceive the taxpayer. The courts of this country have applied various tests in determining when it is necessary to order a new trial due to prosecutorial impropriety. In our case, conviction should be set aside if there is "any reasonable likelihood" that the false testimony could have affected the judgment. Mooney v. Holohan, 294, U.S. 103, 74 L.Ed. 791, 55 S. Ct. 340 (1935).

Both CPA Edward Gilman and Burton Levine acting on the basis of Auditor Kelly's deception, namely, Auditor Kelly was really conducting a criminal audit, stated under oath that they would never had continued on with Auditor Kellys' audit for a moment had they known that the audit was a criminal one. The deception by the IRS, compounded by the U.S. Attorneys' Office, simply resulted in a violation of petitioner's constitutional rights.

MISCONDUCT OF THE PROSECUTION

Thus, the misconduct of the prosecution is



jurisdictional, constitutional and involves an area of law that results in a complete miscarriage of justice. U.S. v. Morgan, 346, U.S. 502, 512 (1954), amply covers this subject.

The brief on page 8 of the Solicitor General says that "the district court correctly concluded that Kelly had no firm indication of fraud on petitioner's part prior to the meeting with Levin...." Kelly in his own handwriting in Government Ex. 6 of the so-called "hypothetical," headlines, "Facts" and "My Conclusions:"

"1) All the transactions the taxpayer had involving the above mentioned stock would indicate that he owned the stock. 2) The statements made by the corporations's accountant completely contradicts the statements made in the corporate minutes. 3) By transferring the gain to the corporation there was a substantial tax savings. However, the taxpayer continued to have complete and full use of the proceeds from the sale. 4) Other than the letter from the accountant and the corporate minutes, which are both self serving, there is no attainable information to indicate that the stock was owned by anyone other than the taxpayer. 5) It is my opinion that the idea of transferring the stock to the corporation developed after the sale of the stock. When the taxpayer realized that he would have a large tax liability, he decided to transfer the stock to the corporation."



Auditor Kelly's "Conclusions" prove he believed had a fraud case September 21, 1970 as well as on March 25, 1970. But he continued his investigation for fraud from March 25, 1970 to the date of trial June, 1976.

The Solicitor General's office on page 7 of his brief mentioned possible violations of the 4th Amendment; they are involved in the instant case as follows:

"In this case, petitioner contends that his conviction was tainted by the use of evidence obtained from him in violation of the 4th Amendment. The courts on a few occasions have held on direct appeal that, where government personnel intentionally misrepresent the nature of a tax investigation, evidence obtained as a result of such misrepresentation may be subject to suppression. E.g., U.S. v. Tweel, 550 F.2d 297(5th Cir.1977). See also U.S. v. Allen, 522 F.2d 1229, 1233(6th Cir. 1975), cert. denied, 432 U.S. 1072 (1976).

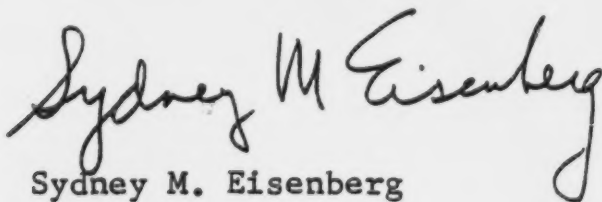
CONCLUSION

Petitioner was a victim of a newly and especially created theory of crime; namely, the compilation of mistakes constitute the crime of signing a false return. Take away the numerical surplus of innocent mistakes, developed by Kelly and Levin and consider the CPA's would stop the



audit if advised of the criminal nature of the audit, there is simply no case whatsoever. How does an "experienced" attorney contend with perjury, destruction of records, misleading and withholding of vital facts? Petitioner discovered a morass of traps, impediments and confusion in the IRS case, resulting in violations of his constitutional rights.

Respectfully submitted,

A handwritten signature in cursive script that reads "Sydney M Eisenberg". The signature is written in dark ink and is positioned above the typed name.

Sydney M. Eisenberg
Pro Se
Petitioner

P. O. ADDRESS:

1131 West State Street
Milwaukee, Wisconsin 53233
414/271-0931